No. 02-1478

Supreme Court, U.S.
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In The Supreme Court of the United States

MARTIN P. SHEEHAN,
Trustee for the Bankruptcy Estate of T & T Fuels, Inc.
and Sheehan & Nugent, P.L.L.C. and
Phillips, Gardill, Kaiser & Altmeyer, PLLC,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO Brief in Opposition to Petition for Writ of Certiorari

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I. Objection to Respondent's Effort to Present Additional Questions

Instead of addressing the two questions presented by the petitioners, WVDEP has attempted to interject various additional questions for review.[1] This is a disguised and untimely effort to cross-petition for certiorari that is prohibited under Supreme Court Rules 12.5 and 13.4 The sole issues properly presented for review are the two issues presented by petitioners, as well as those fairly included therein. The new issues presented by WVDEP are not properly before this Court. See e.g., Namet v. United States, 373 U.S. 179 (1963); and, Lawn v. United States, 355 U.S. 339, rehearing denied, 355 U.S. 339 (1958).

II. Reply to Objections Made By Respondent

WVDEP assert that Petitioners have improperly raised issues for the first time in this Court. Petitioners deny that this has occurred. As demonstrated below, all matters raised here have been repeatedly articulated in the Bankruptcy Court, the United States District Court and the United States Court of Appeals.

Petitioner's specifically noted their reliance on the common benefit doctrine in the initial motion filed in the Bankruptcy Court. There petitioners described the common benefit doctrine, "The United States Supreme Court has repeatedly held that the federal courts, sitting as courts of equity, have the power to award attorney fees to lawyers whose efforts contribute to the gaining of rights for others." The synopsis of cases applying the common benefit doctrine. Trustee v. Greenough, 105 U.S. 527 (1882); Central Railroad & Banking Co v. Peltus, 113 U.S. 116 (1885); Hobbs v. McLean, 117 U.S. 567 (1886); Harrison v. Perea, 168 U.S. 311 (1897); United States v. Equitable Trust Co., 283 U.S. 738

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[1] Only the second and third questions presented in the Brief in Opposition bear a proper relationship the two questions presented by Petitioners.

(1931); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Mills v. Electric Auto Lite Co., 369 U.S. 375 (1970) and Hall v. Cole, 412 U.S. 1 (1973). See J.A.[2] at pages 65-68.

Thereafter, in a brief, Petitioners made the same argument in reliance on the same cases. See J.A. at pages 126-27. That analysis included a quotation from Hobbs v. McLean, 117 U.S. 567 (1886) which sets forth the common benefit doctrine. "When many persons have a common interest in a trust property, or a fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed for his attorney from the property of the trust or by proportional contribution form those who accept the benefit of his efforts." Id. at 582. See J.A. at 116-117. In the United States District Court the same argument was made in reliance upon the same cases, including the same quotation from Hobbs. See J.A. at 271-272.

The same argument, citing the same cases, including the quotation from Hobbs v. McLean, supra, was again made to the Court of Appeals. See Brief of Appellant to the United States Court of Appeals for the Fourth Circuit at page 17.

WVDEP also denied that WVDEP representatives had told the bankruptcy trustee that no separate agreement would be made with Paul Thomas. This assertion by WVDEP is also wrong.

In the initial motion seeking relief filed in the Bankruptcy Court, the Petitioners asserted, "The trustee and his counsel had generally been informed that the DEP did not intend to pursue a settlement except as part of the bankruptcy and the attendant efforts of the trustee on behalf of all creditors." See J.A. at page 64. Petitioners also avered,

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[2] All references to the J.A. refer to the Joint Appendix filed with the United States Court of Appeals for the Fourth Circuit. This appendix includes the relevant documents filed in the Bankruptcy Court and in the United States District Court.

"When DEP acted to settle with the Thomas' interests separately from the trustee, and **in contravention of express representations made to the trustee and his counsel**, DEP made use of the work done on behalf of itself and creditors of the bankruptcy estate of T & T Fuels, Inc. by the attorneys for the trustee. See J.A. at 68-69 (Emphasis added).

This idea is also in the brief filed in the United States District Court, See J.A. at 262. Finally, in the Brief of Appellant to the United States Court of Appeals for the Fourth Circuit at page 8, Petitioners said, "Despite representations that it would not do so, the State entered into a separate peace with the Thomas interests..." The trustee and his attorneys again stated, "As indicated above, the trustee and his counsel had generally been informed that the DEP did not intend to pursue a settlement except as part of the bankruptcy and the attendant efforts of the trustee on behalf of all creditors." J.A. at 8.

The Petition for a Writ of Certiorari contains neither a new assertion of a legal issue, nor the suggestion of new fact. These ideas are clearly and consistently in the record. There is no foundation for denying the requested writ because new matters were raised.

III. Argument - The Record Below

As the record irrefutably demonstrates the decisions of the courts below rest exclusively on the questions presented by Petitioners. The Bankruptcy Judge made clear "The Court makes no finding as to the Trustee's rights under quantum meruit. The sole issue addressed herein is the State's protection from this claim under the Eleventh Amendment." App.[3] at 30. The Bankruptcy Court found the Eleventh Amendment applicable and then denied there had

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[3] References to the Appendix included in the Petition for a Writ of Certiorari, which contains the opinions of the courts below, are made as App. at __.

been a waiver. "Although a state can waive Eleventh Amendment immunity by initiating legal action, the state has not waived immunity from suit by filing a proof of claim in the bankruptcy court." App. at 33.

That court did not address the scope of its authority to award relief on a quantum meruit basis, or if. another forum, the West Virginia Court of Claims, might be a better forum. Instead, the Bankruptcy Court considered the first issue present in every case, jurisdiction.[4] That determination hinges on a question of constitutional law, the applicability of the principles of the Eleventh Amendment in bankruptcy. No decision could rest on non-constitutional grounds.[5] The determination of jurisdiction, when the Eleventh Amendment is asserted, always requires constitutional decision-making.

The District Court acknowledged that Petitioners had raised the applicability of the Eleventh Amendment as an issue, but that Petitioners had conceded that existing precedent foreclosed the District Court from reexamining the issue. App. 13. The District Judge wrote, "Therefore, the second and only issue present to this Court is whether the DEP waived the protection of the Eleventh Amendment and consented to jurisdiction in Bankruptcy Court as a result of filing a proof of claim in the Bankruptcy Court, participating in the bankruptcy proceedings, acquiescing in and

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[4] The text of the Eleventh Amendment prohibits any extension of "judicial power" to resolve issues against states. It had been interpreted as a matter of subject matter jurisdiction, Ford Motor Co. v. Department of the Treasury of Indiana, 323 U.S. 459 (1949) which could be asserted for the first time in the Supreme Court of the United States. Ford has been overruled, Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613 (2002) The Eleventh Amendment is now viewed as giving States a privilege to assert a lack of jurisdiction which can be waived.

[5] For example in Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613 (2002) the Court addressed the waiver of the Eleventh Amendment in a case that appeared ripe for remand to the State Courts.

supporting the bankruptcy trustee's actions in carrying out his fiduciary duty to the bankruptcy estate, and in benefiting from the efforts of the trustee's counsel which may have helped the DEP to reach a restitution agreement in a separate criminal action." App. 13-14.

The panel of the United States Court of Appeals for the Fourth Circuit which decided this matter, similarly recognized that although raised as an issue, it could not overrule a previous panel decision to find the Eleventh Amendment inapplicable to bankruptcy cases. App. at 6, at unnumbered footnote. "The only issue presented in this appeal is whether DEP waived its Eleventh Amendment immunity." App. at 6.

The questions now presented to this Court relate to jurisdiction, the threshold issue in every case, and the only issues presented and decided below.

IV. Argument - The Plan of Convention

In the Petition for a Writ of Certiorari, the trustee and his counsel emphasized that the decision of the United States Court of Appeals for the Fourth Circuit in the instant case is inconsistent with a decision of the United States Court of Appeals for the Sixth Circuit in Hood v. Tennessee Student Assistance Corp. (In re: Hood), 319 F.3d 755 (6th Cir. 2003) petition for cert. filed, No. 02-1606, 71 U.S.L.W. 3724 (May 2, 2003). The brief filed by WVDEP acknowledges that such a conflict exists. Brief in Opposition at 13 and 18.

Under the reasoning of the Sixth Circuit, the entirety of 11 U.S.C. § 106 would be constitutional. That court found that the Eleventh Amendment was inapplicable to bankruptcy proceedings. This results from a determination that the States ceded sovereignty over bankruptcy matters as part of the "plan of convention".[6] In the decision of the

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[6] As more fully briefed in the Petition for a Writ of Certiorari, the Hood court reasoned that the States retained all aspects of sovereignty not ceded as part of the "plan of convention." Actions by individuals against

United States Court of Appeals for the Fourth Circuit found controlling in the instant case, Schlossberg v. Maryland (In re: Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140 (4th Cir. 1997) cert. denied, 523 U.S. 1075 (1998), the Court held that both 11 U.S.C. § 106(a) and (b) would be unconstitutional. It held that the Eleventh Amendment was applicable to bankruptcy proceedings and the general rule of abrogation of sovereign immunity in subsection (a) violated the Eleventh Amendment. It also held that the effort to define circumstance from which a waiver of sovereign immunity might be inferred contained in 11 U.S.C. § 106(b) was also void. The views of these two courts are polar opposites.

As the Brief in Opposition indicates[7] some other Courts of Appeal have reached an intermediate position. These Courts have found that 11 U.S.C. § 106(a) is unconstitutional, and have either found 11 U.S.C. § 106(b) constitutional, Wyoming Department of Transportation v. Straight (In re: Straight), 143 F.3d 1387 (10th Cir. 1998) and Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico, 270 F.3d 17 (1st Cir. 2001); or have avoided the question by finding a waiver of the Eleventh Amendment by litigation conduct, Rose v. United States Department of

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States were not generally understood to have been ceded to the federal government as part of the judicial power as explained in The Federalist, No. 81. However, The Federalist, No. 81 appears to cross-reference The Federalist, No 32. That document suggests sovereignty was fully ceded on those matters, naturalization and bankruptcy, for which Congress was given the power to pass a "uniform law." When Chisolm v. Georgia, 2 U.S. (Dall.) 419 (1793) frustrated the limitations on federal power described in The Federalist, No. 81, the Eleventh Amendment was enacted to restore "the plan of convention." Given the restorative design of the Eleventh Amendment, the Hood court reasoned that Amendment did not recapture sovereignty over bankruptcy matters which sovereignty had been ceded in the plan of convention.

[7] "The WVDEP states that there are really four different types of decisions related to the validity of 11 U.S.C. § 106 and/or whether a State waives its immunity by filing a proof of claim." Brief in Opposition at 13.

Education (In re: Rose,) 187 F.3d 926 (8th Cir. 1999) and Schulman v. State of California, 237 F.3 967 (9th Cir. 2001) cert. denied, __ U.S. __, 122 S. Ct. 458 (2001)

Petitioners do not believe resolution of the instant case will turn on the constitutionality of 11 U.S.C. § 106(b)[8] and have not emphasized this distinction made between these two subsections and the differing views held by the various Courts of Appeal. However, the existence of multiple views of the applicability of the Eleventh Amendment in the bankruptcy context, strengthens rather than weakens the need for this Court to resolve the conflict that now exists among the Courts of Appeal.

The importance of resolving the conflict is echoed in the petition for certiorari filed in Hood. The Attorney General of the State of Tennessee seems to agree that the issue which is at the heart of the conflict between the Courts of Appeal is an issue of importance. The volume of bankruptcy cases, over a million new cases per year for the last several years, and the frequent appearance of States and State agencies as creditors in those cases, adds weight to the importance of the question presented.

V. Argument - Waiver by Litigation Conduct

WVDEP argues that "the history of case law, both pre- and post-Seminole Tribe [of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.E.2d 252 (1996)] hold that 'waiver' only occurs for compulsory counter claims." Brief in Opposition at page 16. This statement can only mean that WVDEP asserts there is no division of authority in the Courts of Appeal or deviation from decisions of this Court on whether a waiver, by litigation conduct, can be found in any circumstance other than where there is a compulsory counter claim.

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[8] 11 U.S.C. § 106(b) codified the holding of this Court in Gardner v. New Jersey, 329 U.S. 565, (1947).

With that idea the trustee and his counsel disagree. Most recently, this Court upheld the jurisdiction of a federal magistrate to determine a case by inferring consent to trial before a federal magistrate from the litigation conduct of the parties. Roell v. Withrow, __ U.S. __ , 123 S. Ct. 1696 (2003). Although the Roell decision does not implicate the Eleventh Amendment directly, it does address the circumstances under which a personal privilege to waive jurisdiction may be found. Since the decision in Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613 (2002) which overruled Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945) consent to jurisdiction under the Eleventh Amendment has become more like a personal privilege of the sovereign to waive, or not, instead of a subject matter jurisdiction issue that survives indefinitely.

Thus Roell becomes a useful precedent. There, this Court held that where parties appeared before a federal magistrate who on several different occasions expressed the view that the statutory preconditions to the exercise of jurisdiction by a federal magistrate had been satisfied, specifically the written consent of all the parties, and some of the parties who had not given written consent none the less continued to litigate, theses parties would be deemed to have actually given consent by their litigation conduct. Roell specifically provides:

> We think the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge. Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority. (Emphasis added.)

Roell is important to the instant problem in two respects. First, it focuses, as this Court did recently in Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613 (2002), on ending the gamesmanship of deferred objections to jurisdiction. It also provides depth to understanding that a wide variety of litigation conduct may support an inference of consent to jurisdiction. The narrow definition insisted upon by the Court of Appeals for the Fourth Circuit, which limited litigation conduct waivers only to those circumstances in which a compulsory counterclaim would lie, is too narrow.

Conflict clearly exists with In re: Bleimeister, 296 F.3d 858 (9th Cir. 2002) which was decided after Lapides, but before Roell. In Bleimester the Court of Appeals found that after sensing a likely defeat in a bankruptcy matter, Arizona had waived the opportunity to assert immunity by a sneak-a-peek approach to litigation. While neither Lapides nor Roell are decisions rendered in a bankruptcy context, Bleimeister is an appeal from a bankruptcy court. Bleimeister recognizes that the spirit of Lapides is to eliminate tactical assertions of immunity to permit States to achieve unfair advantages. Bleimeister also seems predictive of the outcome in Roell which seeks to "check gamesmanship" in litigation.

The decision in the instant case stands in stark contrast to this approach. "Because Sheehan's claim for attorneys' fees does not amount to a compulsory counterclaim against DEP's proof of claim, the DEP has not waived its Eleventh Amendment immunity with respect to the adjudication of Sheehan's claim." App. at 8.

The instant case examines the notion of consent in the bankruptcy context. The narrowness of the test used by the Court of Appeals for the Fourth Circuit to evaluate whether there has been a consent to jurisdiction as a result of litigation conduct is out of step with recent pronouncements of this Court and in conflict with other

Courts of Appeals. Deciding this case would resolve an issue of some importance in the bankruptcy courts.

CONCLUSION

Wherefore Petitioners pray this Court will grant the Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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